Supreme Court of the United States,

GEORGE L. WHITMAN, Petitioner, AGAINST THE NATIONAL BANK OF OXFORD, Respondent.	October Te m, 1898. No. 182.

BRIEF FOR RESPONDENT.

This cause comes before this Court on a writ of *certiorari* granted by this Court to review a decision (fols. 83-96) of the Circuit Court of Appeals for the Second Circuit, affirming a judgment of the Circuit Court of the United States for the Southern District of New York, in favor of the present respondent, the National Bank of Oxford, and against the petitioner George L. Whitman. The judgment was upon suit by the present respondent, amounted to $4,205.48, and was entered upon a verdict by a jury rendered under direction of the Circuit Court (19-26.)

Statement.

A corporation was duly formed in the year 1886, pursuant to the general laws of the State of Kansas, under the name of the Arkansas City Bank (28-34). Its purpose was a general banking and real estate business (29,30) and its offices were located in Arkansas City, Cowley County, Kansas (30, 35). Its principal incorporator (30) was the petitioner George L. Whitman. Mr. Whitman was one of the original directors (30), and has owned from the beginning $100,000 of its capital stock, or half the entire capital stock of the

bank (17, 33, 38, 39). For a time the bank was prosperous, as is evidenced by the fact that the petitioner received a large amount of dividends (39). But in December, 1890, it suspended payments and made a general assignment for the benefit of its creditors (44–47, 57). From the time of its assignment it completely suspended its business.

About four months prior to its failure the bank endorsed and guaranteed for value and promised to pay two promissory notes (47–52), which were discounted with the respondent, a national bank located in Pennsylvania. It will be noticed that the endorsement was in the name of the Arkansas City Investment Company; this is explained by the fact that in the year 1889 the name of the bank had been duly changed from the Arkansas City Bank to the Arkansas City Investment Company (40–43). The obligations of the corporation evidenced by these two notes were among its unpaid debts at the time of its assignment. The assignee made part payments upon them from time to time, until in 1895 (more than a year after the suspension) the balances unpaid were reduced to the form of a judgment in favor of the present respondent and against the Arkansas City Investment Company, rendered in the District Court of Kansas, for the sum total of $3,468.30 (59–61). This judgment was rendered upon voluntary general appearance of the corporation, followed by the interposition of an answer through an attorney at law. Thereafter an execution was duly issued out of the District Court upon the judgment against the corporation, directed to the Sheriff of Cowley County, and the same was returned wholly unsatisfied (56, 57, 61–64). The Sheriff could not find any property whereon to levy the execution, having exercised all possible diligence in endeavoring to find property and effects of the corporation whereon to levy, and having entirely exhausted the assets and property of the corporation. It appears, moreover, that nothing whatever remains in the hands of the assignee (52–56).

When this corporation was formed, the Constitution of the State of Kansas provided, and still provides, as follows:

Constitution, Article XII., Section 2:

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual

liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

No "*other* means" have been "provided by law." The Legislature has enacted (General Statutes 1868, Ch. 23, Sec. 46; General Statutes 1889, Section 1206): "No stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him."

But, for the enforcement of that individual liability of the stockholders which was enacted in the Constitution itself there have been special remedies provided by statute, the Legislature, however, at the same time, expressly leaving open to the creditor of a corporation the privilege of proceeding by ordinary action instead of availing himself of the special remedies. The first of these remedies is as follows:

General Statutes 1868, Ch. 23, Sec. 32 (General Statutes 1889, Sec. 1192):

> "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly."

And the Legislature, out of abundant caution, adds the following clause to this section of the statute:

> "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The other remedy is special only in the sense that under the contingency there provided an action (of the ordinary form) may be

brought without a preliminary judgment against the corporation. It is as follows:

> Section 44 (G. S. 1889, Sec. 1204). "If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and" (the balance of the section relates to a special remedy in favor of a stockholder who, having satisfied his liability, has brought an action for contribution against his brother stockholders).

Section 40 (G. S. 1889, Sec. 1200) gives a statutory definition of what is meant by the phrase "if any corporation be dissolved." It provides:

> "Any * * * corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

From the foregoing statement of the facts in this case it will be noticed: An execution has been issued against this corporation, and no property could be found whereon to levy the same, and it was returned unsatisfied; furthermore, the corporation has suspended business for more than a year, leaving various debts unpaid, including the debts (regularly proven also on the trial of this action) on which the judgment in question against the corporation was recovered. It is admitted by the answer in this case that the petitioner has not thus far been subjected to any liability as a stockholder of the corporation.

The petitioner offered no evidence at the trial, and the truth of the facts narrated above was not questioned.

ARGUMENT.

We have contended successfully in the courts below, and we now contend that :

It is unnecessary in this case to decide whether the liability of a stockholder of a Kansas corporation is penal or contractual in nature, as *Huntington vs. Attrill*, 146 U. S., 657, has settled that the only liability enacted by the Constitution or statutes of one State to which the Courts of another State should not necessarily give effect, is that strict penal liability which only an action of a criminal or of a quasi-criminal nature can enforce. If the provisions of the Kansas Constitution and statutes are only "penal" in the broad sense of the word, the Courts of other States should enforce them.

Such provisions, however, are clearly contractual in nature. This is apparent upon their face. It has also been so determined by the highest Court of Kansas. The construction of the nature of the liability by that Court should be followed elsewhere.

The liability is identical in its nature and extent with the liability of a stockholder of a national bank. The only excuse for any disfavor into which the provisions of the Kansas Constitution and statutes may have fallen in any courts is that the organic law of a Kansas corporation is not as commonly known and borne in mind, both by lawyers and laymen, as are the provisions of the National Banking Act.

Our points do not follow the order of discussion above suggested, because it will be more convenient if we answer *seriatim* each point of the petitioner's brief.

POINTS.

I.

The provision of the Kansas Constitution is, if not self-executing, at least declaratory of a legal relation involving rights and liabilities.

The Constitution of the State of Kansas amended the liability of a stockholder at common law—which is merely to pay for his stock—by providing that, up to an amount equal to his holdings, he is under an "individual liability" to secure the payment of the dues of the corporation. The Constitution expressly excepted stockholders of railway and charitable corporations. It also gave a free hand to the Legislature, by providing that corporate dues might be secured by "such *other* means as shall be provided by law."

It is contended by our opponents that the liability stated in the constitution is not self-executing, and authorities are cited in support of that view.

Our position is that the amendment of the common-law liability of the stockholder enacted by the Constitution is *not* of a nature where the right thus secured the creditor reaches no further than the expressed remedy, and which fails entirely unless some constitutional or statutory remedy is enacted to give it sanction. The provision, therefore, is self-executing. But our position is, furthermore, that, even were this not so, yet it is perfectly permissible for a transitory remedy to be enacted by the Legislature without a restatement of the liability (already stated in the Constitution) that it is intended to enforce. The Constitution of a State, in respect to such provisions as the one we are considering, is merely a *statute*, which it is difficult to amend and to which contravening statutes must yield. Such provisions as the one now to be considered are part of the *statutes* of the State, by the very fact that they appear in the Constitution, and it is unnecessary to repeat them. The provision of the Constitution is to be read into the charter of every corporation thereafter created in the State of Kansas. It becomes *ipso facto* part of the fundamental law of every such corporation—its articles of association—and no Act of the Legislature can declare otherwise, or is needed to give it effect. Every person who becomes a stockholder in any such corporation

becomes bound as part of his contract of subscription (if he be an original subscriber) or assignee of the original subscriber (if he be a subsequent purchaser) to pay the debt of the corporation up to the amount of his stock. Every person who becomes a creditor of such a corporation has a right to rely on this contractual obligation, and becomes a party to such contractual obligation, and has a right to enforce it in any Court of Jutice having jurisdiction of the person of the stockholder. To limit this right by the boundary of the State is as unreasonable as it is unjust to the stockholders who happen to be citizens of Kansas and upon whom would thus be thrown the entire burden of the constitutional liability.

In respect to our first proposition: There is nothing in the nature of the liability stated in the Constitution which is of such a novel character, or which is so indefinite, as to make the liability in itself incapable of enforcement in any ordinary court. The secondary liability of a surety is a liability the nature of which has been recognized everywhere and for centuries. The extent of it is detailed in and measured by the contract or statute which creates it, and the amount to be paid in exoneration of it can be adjusted in any court exercising the functions of the ordinary court of common law. If it be suggested that in the ordinary case of suretyship the identity of the particular individual is always disclosed in whose favor the suretyship is to exist, the answer is that a liability of the nature stated in the Kansas Constitution is, to a certain extent, a liability in favor of a third party to a contract. Some courts at one time may have been troubled about the theories underlying the enforcement of contracts for the benefit of an outside party, at the instance of such outside party; but it was never thought that, if a court was required either by precedents or by statute to enforce such a liability, it would have any inherent difficulty in so doing.

In short, there is nothing intrinsically difficult in making a stockholder answerable to an extent for the debts of a corporation. It is being done throughout the country under the provisions of the National Banking Act, and no Federal court has yet pleaded incapacity when called upon to ascertain the amount that should properly be paid.

If, therefore, this constitutional provision be not self-executing, it is not on account of the nature of the liability, but because of the words in which it is framed.

The argument is made that the use of the words "shall be" demonstrates the necessity of future legislative enactment. We think not. The words, in our opinion, are those of command—mandatory, it may be said. That is the security that a creditor of a Kansas corporation *shall have*. It is to be borne in mind that when the maker of a constitution phrases its provisions he is looking to the future. A statement that dues from corporations *are* secured by the individual liability of the stockholders would have been an untruthful statement. That was *to be* the rule, and it was appropriately stated by using the words "shall be."

The other construction would practically rewrite the provision, so as to make it read that dues from corporations shall, *if the legislature so enact*, be secured by the individual liability of the stockholders there stated, and by such other means as the legislature shall provide. Writing that extra clause into the provision, we do two things: The first provision becomes merely tautological to the second; and all force whatever is taken from both provisions. The framers of the Constitution should be given the credit of intending to enact something. If what they have enacted is in unambiguous language, there is nothing in the nature of the subject of which we are treating which requires the Courts to detract from its effect.

It would give this particular topic undue importance should we undertake to review all of the authorities upon constitutional provisions which have similar language. We merely refer to *Willis vs. Mahon*, 48 Minn., 140, in which it was held that the article of the Minnesota Constitution was self-executing, which read as follows:

> "Each stockholder in any corporation * * * * * shall be liable to the amount of stock held or owned by him."

This case was decided in 1892. The briefs of counsel on either side are given in the report and seem to have been most exhaustive. Judge MITCHELL'S opinion is very full and reviews all of the cases. It is to be noted that the words "shall be" are contained in the Minnesota Constitution.

People ex rel. McClelland vs. Roberts, 148 N. Y., 360, contains an excellent argument in reference to provisions in the New York Constitution, which supports the view we take on this subject.

In reference to the authorities cited under this point by the other side:

Wells vs. Robb, 43 Kansas, 201, is very far from a decision that the Kansas Constitution is not self-executing. The phrase "is wholly governed by the *statute*" relates back to the preceding sentence of the opinion. The statute referred to is a "constitutional or statutory provision."

Barnes vs. Wheaton, *Marshall vs. Sherman* and *Tuttle vs. The National Bank of the Republic*, are instances of the hostility of the State Courts of New York and Illinois to recoveries upon liabilities of this nature. We shall contend in a subsequent point that the views of the courts in these two States, as to the effect to be given to the liability of a stockholder in a Kansas corporation, are contrary to the views of all the Federal Courts without exception, and contrary to the views of all of the State Courts, except in the instance of the State of Rhode Island. In other words, they are contrary to the general trend of authority. Their arguments in respect to the effect of the constitutional provision form merely one link in the chain of what we respectfully contend to be fallacious reasoning. To take, by way of example, the quotations from the opinion in *Barnes vs. Wehaton* that appear in the brief of the other side. First, the learned Court cites the provision of the Ohio Constitution, the phraseology of which is very different from that of the Kansas provision. In Ohio, the phrase is, "such individual liability and other means as may be prescribed by law." In Kansas, it is, "individual liability and such other means as may be prescribed by law." The learned Court then cites an Ohio case which *upholds* our present contention. Following that is a citation of a California case which was carefully distinguished in *Willis vs. Mabon* on the ground that the phraseology of the provision of the California Constitution was essentially different. Thereupon are cited the two Federal cases upon this point, and a Missouri case. The Missouri case does not help the contention, as the Courts of that State have enforced the liability in the case of Kansas corporations.

In short, the only authorities which it is important to consider in this connection are *Morley vs. Thayer* and *Groves vs. Slaughter*. *Morley vs. Thayer* is the only instance of general hostility on the part of a Federal Court to actions of this nature. It was decided many years ago and its opinion contains many of the views then frequently expressed in the courts which have since been overruled by

the Supreme Court in *Huntington vs. Attrill.* So far as it discusses the particular topic now considered, the reasoning we respectfully submit is not sound. Judge CLIFFORD said: "Power is plainly given to the Legislature in this case to pass laws to render stockholders individually liable." The Legislature would have had that power without any such provision in the Constitution. If that is the only effect to be given to the constitutional provision it has no force at all.

The only authority relied upon by the learned Court is the early case of *Groves vs. Slaughter*; and after a careful search we have been unable to find any other case in the United States Supreme Court bearing upon this point.

Groves vs. Slaughter was decided in 1841. The question involved related to slavery. The views of the various members of the Court were greatly criticised in the Dred Scott decision, which shortly succeeded it. Finally, the constitutional provision then held not to be self-executing, differed materially from the one at bar. The provision of the Constitution was: "The introduction of slaves into this State as merchandise or for sale shall be prohibited from and after the first day of May, 1833."

In the leading opinion rendered by Mr. Justice THOMPSON particular stress is placed on the fact that a provision of that nature has no sanction until penalties are enacted. In this respect, if our prior reasoning has been accepted, there lies an important distinction from the provision of the Kansas Constitution.

We have said this much, not because this case turns upon the view of the Court as to this particular topic, but because we think that there has been a thorough misconception as to the scope and effect of a constitutional provision such as the one in the Kansas Constitution. The idea seems to have been that to place a provision of this nature in a constitution of a State rather than in a statute of a State was to relegate it to obscurity. Such is not our view of the subject. The only case which for a moment sanctions this contention in this Court is that of *Groves vs. Slaughter*, and for the reasons which we have heretofore given we do not think that that case is controlling.

Admitting, however, for the purposes of argument, that it was necessary to enact a statute for the enforcement of the right declared in the Constitution, it was not, therefore, necessary in such a statute to reiterate the declaration of the right.

Our learned opponents having contended to their satisfaction that the clause in the Constitution is not self-executing, proceed then to treat this whole question as if the Constitution had never existed; and finding no express declaration of this right in the statute, they argue that nowhere is there any declaration of the individual liability of stockholders. That contention forms the basis of their point, that there is nothing to the statute but the remedy.

An examination of the statutory provisions side by side with the provision of the Constitution shows that they were enacted by the Legislature having in mind the constitutional provision, and that the Legislature deemed it unnecessary to say again what had already been said in the most powerful statute of the State. For instance, Section 40 speaks of the "individual liability." There is nothing else to which that statute could refer than the language of the Constitution. Again, in both Sections 32 and 44 there is the Constitutional exception relating to railway, religious and charitable institutions. *Moreover, Section 46 is a practical re-statement of the constitutional provision.*

In the National Banking Act one section states the liability of the shareholder, while another sketches a remedy. It might as well be contended that the separation into sections deprived each section of any value as to contend that the separation between the Kansas Constitution and the Kansas statute rendered both nugatory. If what was stated in the Constitution had been stated in Section 32 and Section 44 of the Statute, the entire argument of the petitioner's counselwould fail. Does it not then become a manifestly illogical and fallacious argument?

II.

Having in mind the Constitutional provision as a declaration, even if not self-executing, the special remedies of the statute become merely additional remedies to the ordinary one by an action in any court of record.

What actuated the Legislature in supplementing the Constitution by any statutes seems to have been a desire to provide sum-

mary remedies for the enforcement of the constitutional liability, at the same time expressly reserving the ordinary remedy by action. In creating these remedies the Legislature naturally formulated the conditions precedent to their use, and did so according to the general rules of law relating to stockholders' liability.

The third edition of Mr. Cook's work on Stock and Stockholders cites an abundance of authorities in support of its terse general statement of these rules. The particular point to which we wish to direct attention is that *when once the liability is declared*, nothing more is *necessary* by way of a remedy, but all provisions in addition are merely *convenient*, either in the line of providing summary remedies or of codifying the law relating to the enforcement of the liability.

> "SEC. 218. THE STATUTORY LIABILITY CAN BE ENFORCED BY CORPORATE CREDITORS ONLY.—The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the shareholders. Nor can the corporation upon the insolvency assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a Receiver of an insolvent corporation, invested with 'all the estate, property and equitable interests' of the concern, has no power to enforce such a liability as this.
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> "SEC. 219. JUDGMENT AND EXECUTION MUST BE OBTAINED AGAINST THE CORPORATION BEFORE THE STOCKHOLDER'S STATUTORY LIABILITY CAN BE ENFORCED.—Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets. This rule arises from the fact that liability of the stockholders is not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource."
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> "Frequently the statutes which impose this extraordinary or *extra* common-law liability upon shareholders provide that a creditor shall obtain judgment against the corporation, and that an execution duly levied thereunder shall have been

> returned wholly or partially unsatisfied before the creditor has a right to proceed against the stockholders individually. But, in general, proceedings against the corporation are not to be required when they would be nugatory or impossible."

The first of the two statutory provisions in Kansas is for the ordinary case of judgment obtained against the corporation, execution issued and returned unsatisfied. With those conditions precedent fulfilled, the creditor may at once issue a summary execution against stockholders of the corporation, or he may "proceed by action" in cases where it is not feasible to take such short proceeding. It will be noticed that the formulation of the conditions precedent to the issuance of an execution against the stockholder, or to procedure by action, result merely in a reiteration of the general rules, as stated in the citation from Cook. It, therefore, is unnecessary to debate whether the conditions precedent stated in the statute are obligatory to a procedure by action, because the same conditions precedent are obligatory to a suit of this nature even if not so expressly stated by statute.

In the case at bar we have obtained the judgment, execution has been issued and returned unsatisfied. We have, therefore, fulfilled the conditions precedent as stated in the statute and have fulfilled as well the conditions precedent as laid down in the general rules of law upon this subject.

Counsel for the petitioner seek, however, to interject a subtlety from the fact that in a proceeding under this statute the stockholder is compelled to pay a judgment against the corporation, rather than the original indebtedness. No confusion should arise on this account. In the theory of the law the judgment is but a merger of the indebtedness and constitutes substantially the same claim. The judgment is a debt of the corporation just as much as the note on which it was recovered.

The only new question which in some suits against stockholders is presented by the recovery of a judgment, is not involved in the case at bar, viz., the conclusiveness of the effect of the judgment upon the stockholder.

In *Hawkins vs. Glenn*, 131 U. S., 319, the general rule is stated which is followed in Kansas and generally elsewhere, when the subject is presented for adjudication. The Court there says :

> " The stockholder is bound by a decree of a Court of Equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

But the question of the force, effect and conclusiveness of the Kansas judgment is not involved in this case. To quote from the opinion of the learned Judge who delivered the decision of the Court in the Circuit Court of Appeals (86) :

> " It will be observed that the complaint contains the averments which are required either by Section 32 or Section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was based, such as the guaranty, the discount and the nonpayment were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established, against the stockholders, the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder."

The theory of the stockholder's liability is that it is a secondary liability for the debts of the corporation. Under the constitutional provision declaring that liability, it might well have been left to the Legislature to say how conclusive should be the effect upon it of a judgment against the corporation. If a surety give his bond in any case, he may agree to be liable by the very fact of the entry of a judgment in a suit to which he is not a party. More often he gives his bond, the liability upon which is to be determined by the result of a suit to which he is privy, although not a party. And if his liabil-

ity be of neither of those natures, and be in no way affected by the entry of the judgment, nevertheless, if in an independent suit brought against him to determine that liability, the debt of the corporation be proved and the merger into the judgment be proved and he be liable for the debt of the corporation, it is obvious that he should pay that judgment of the corporation, which is but a debt of the corporation in its merged form.

Therefore, without citing any of the Kansas decisions upon these statutes but rather examining the question *de novo*, we say that it is a mere subtlety to claim that to charge this stockholder secondarily liable for the debts of this corporation in the way that has been done, is to charge him with a liability totally unknown, not only in extent but in nature, to the class of liabilities that are recognized by the common law.

Counsel pass over the obvious distinction between a case in which it is sought to prove by the corporate records or corporate acts that a certain person *is* a stockholder in a corporation, and the case in which it is sought to fasten upon one who is unquestionably a stockholder in a corporation a liability for what that corporation has done or suffered to be done. The rule may not be logical that the corporate records in themselves prove that one is a stockholder, though even that has been held as *prima facie* true in *Finn vs. Brown*, 142 U. S., 56, but it is strictly logical to hold that when a person is admittedly a stockholder the corporate records shall be evidence of his liability as such.

Nothing in the Kansas decisions renders the situation of a stockholder peculiarly unfortunate. In *Ball vs. Reese*, 58 Kansas, 614, the ordinary rule was laid down, that the judgment is conclusive upon the stockholder in the absence of fraud or lack of jurisdiction. Instances of that rule are

Glenn vs. Liggett, 135 U. S., 533.
Guernsey vs. Moore, 131 Mo., 650.
Holland vs. Duluth Iron Co. (Minn.), 68 N. W. Rep., 50.

Attention is called by our opponents to the situation in respect to Statutes of Limitations. But such statutes merely relate to remedies and have no bearing upon rights and the various classes of rights.

Attention is also directed to the fact that the respondent is recovering interest on the judgment rather than on the debt. To quote from *Grund vs. Tucker*, 5 Kans., 70 :

> "The judgment included interest on the judgment against the corporation. If the original judgment was evidence of an ascertained debt, the responsibility of the corporation, this was correctly done."

In concluding our inquiry into the theory and use of the Kansas statute, we call attention to the fact that, if the Legislature had intended to create a mere remedy, the execution of its intention would have been in contravention of the State Constitution. If the Legislature had sought to limit the right declared in the Constitution by granting exclusive remedies for its enforcement, its statutes to that effect would have been void. Any remedy which by its lack of efficiency substantially impairs a right given by a Constitution, is for that reason unconstitutional. Where a Statute of Limitations has been enacted so short as to hinder even the diligent suitor, the result is unconstitutional.

If the respondent cannot sue the petitioner in the Circuit Court for the Southern District of New York, the constitutional right granted the respondent is practically impaired and done away with. That right was given the respondent by the Constitution of Kansas, in the broadest terms, and no statute of that State could have impaired it, even if such had been its object.

III.

The liability can be enforced in any Federal Circuit Court of the United States which has jurisdiction of the parties.

It is settled law that *any* United States Circuit Court throughout the country, having the requisite jurisdiction by reason of diversity of citizenship and amount involved, and by reason of the residence of parties, and by reason of proper service of process, will entertain any actions except those of a criminal or of a *quasi* criminal nature or those in the nature of a proceeding *in rem*, which class of actions only are confined to the locality where the crime is committed or the *res* is situated. The various refinements heretofore so much discussed,

as to whether the liability sought to be enforced in a civil action be penal or tortious or contractual in its nature, have been entirely done away with by the recent case of

Huntington vs. Attrill, 146 U. S., 657.

In this case a judgment had been recovered in the State Court of New York against Attrill upon Attrill's liability as a director of a New York State corporation for the debts thereof on account of the filing of a false certificate, the plaintiff Huntington being a creditor of the corporation. Suit was brought upon this judgment in the State of Maryland. The highest Court of the State held that it could go behind the judgment to ascertain the nature of the liability upon which it was recovered, and that upon so doing it appeared that the nature of this liability, both according to the decisions of the Courts of the State of New York and according to the decisions of the Courts of the State of Maryland, was highly penal. It therefore dismissed the bill. On writ of error from the United States Supreme Court to the Court of Appeals of the State of Maryland, it was held, in the first place, that a Federal question was involved on account of the "full faith and credit" clause of the Constitution; in the second place that the Maryland Court *did* have the right to look behind the judgment so as to ascertain the nature of the liability; but, in the third place, that after so doing a liability was apparent, penal in its nature in one sense, but not penal in its nature in an international sense, *and therefore not a liability which could only be enforced in the State whose statutes had created it.* Mr. Justice GRAY (p. 666) says:

> "It will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law, stated by Chief-Justice MARSHALL in the fewest possible words: 'The courts of no country execute the penal laws of another' (*The Antelope*, 10 Wheat. 66, 123). In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language.
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> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal and pecuniary, imposed, and enforced by the State, for a crime or offence against its laws (*United States vs. Reisinger*, 128 U. S., 389, 402; *United States vs. Chouteau*, 102 U. S.,

603, 611). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. * * *

"Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * *

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *Private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*; the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*' (3 Bl Com., 2). * * *

"The question whether the statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purposes is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this Court in *Dennick vs. Railroad Co.*, 103 U. S., 11. * * *

"The provision of the statute of New York now in question making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts is in no sense a criminal or *quasi* criminal law. * * * As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of

> the creditor only, and measured by the amount of his debt, it as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. * * *
>
> "The statute was not a penal law in the international sense."

It was therefore held that the Maryland Court should have given full faith and credit to the judgment recovered pursuant to that statute, and the case was remanded to the Maryland Courts for further proceedings not inconsistent with the opinion of the Supreme Court.

The case of *Dennick vs. Railroad Co.*, 103 U. S., 11, which was the precursor of the *Attrill* case, is also directly in point. In that case it was held that the Courts of one State would enforce the liability incurred in any other State on account of the death of a human being in that other State occasioned by negligence and for which a right of action was given by the statute of that other State.

In *Northern Pacific Railroad vs. Babcock*, 154 U. S., 190, both of the above cases were cited and approved, and it was held expressly that all questions relating to the recovery were to be governed by the *lex loci*, and not by the *lex fori*.

It follows from these decisions that the Federal Courts should everywhere enforce what have generally been called penal liabilities. The liability of a director of a corporation for filing a false report is highly penal, as the word is generally understood. The liability arises from the misconduct of the director, and in its extent it is in no wise commensurate with the damage done to the creditor. If a statutory liability of that nature is enforceable outside of the State which enacted it, *a fortiori* the present stockholder's liability is likewise so enforceable.

The cases above cited not only change the old rule that a penal statute will not be enforced in another State because comity does not so require, but they overrule the old theory relating to a penal statute, that it could not be enforced elsewhere, because there was no right connected with it, but merely a remedy. Of course, there might be a provision in a Constitution or in an ordinary statute,

which, at the same time that it declared a right, expressly and in terms limited all proceedings to enforce that right to the Courts of the State in which it was passed. Plainly, that is not the situation in Kansas, and the old cases to which we allude do not deal with any such *express limitations*. We are not discussing any such possible statute.

But as to the ordinary statute of the kind, whether "penal" or "contractual," the theory upon which the *Dennick* and *Babcock* cases have been decided shows that there cannot be a penal statute which merely consists of a remedy, without a pre-existent right. For instance, in these cases it was argued that the killing of the testator by negligence was not a breach of contract, and that, therefore, the liability was not contractual. This Court held that to be immaterial. There was a *right* of action involved in the statute, even if not a contractual one, and this right was capable of enforcement anywhere. In other words, this Court has attached to the old rule that no legal rights exist without a remedy, the proper converse that no remedies exist except for legal rights.

If our contentions in this point should be accepted, the Court might be of an opinion adverse to the contentions advanced in our first and second points, and yet the decision should be affirmed.

Before concluding our discussion of this branch of the case, we call attention to the large number of decisions in the Federal Circuit Courts and United States Circuit Courts of Appeals throughout the country, enforcing the Kansas stockholder's liability. We shall treat these cases more in detail under the succeeding point which deals particularly with the obligation of Federal Courts to follow the construction placed by the Courts of a State upon its own constitution and statutes. But at this point it should be noticed that these Federal decisions do not proceed solely upon that one ground. In many of them there is careful, independent reasoning, leading to the same conclusion as that to which the Kansas Courts came. The liability has been enforced in practically every one of the Circuits, and two of the Circuit Courts of Appeals have added the weight of their authority. In the States of Illinois and New York, the decisions were worked out in contravention of the decisions of the State Court of that forum. The more careful consideration was given to the reasons for the Federal decisions on that account. In Massachusetts the Federal Courts have achieved the great triumph of converting the State Court to their

view; the latest decision in the State Court of Massachusetts having practically overruled the earlier decisions.

For instances of the enforcement of similar liabilities outside of the territorial limits of the State enacting the statute, see

Auer vs. Lombard, 72 Fed. Rep. 209.
Flash vs. Conn, 109 U. S., 371.
Cuykendall vs. Miles, 10 Fed. Rep., 342.
First National Bank vs. Gustin Co., 42 Minn., 329.
Paine vs. Stewart, 33 Conn., 516.
Aldrich vs. Anchor Co., 24 Oregon, 32.
Aultman's Appeal, 98 Pa. State, 505.
Ex parte Van Riper, 20 Wend., 614.
Savings Association vs. O'Brien, 3 N. Y. Sup., 764.

These Courts, to use the words of Judge LOWELL in the *Cuykendall* case above cited, "have not felt inclined to extend the illiberal and narrow rule of comity, or want of it, which stops all remedies at the line of the State. The venerable maxim that 'he who shares the benefit should share the burden' is just, and should not be local in its operation. It applies with full force to shareholders of a corporation."

IV.

The Kansas Courts have construed the nature of the liability in a way that is favorable to our contentions, and Courts elsewhere are bound to follow such construction.

(a)

One of the best-settled rules in this Court is stated in one of its decisions as follows:

> "This Court will adopt the construction of the statutes or constitution given by the Courts of the State, when that construction can be ascertained" *(Fairfield vs. County of Gallatin*, 100 U. S., 47).

This is a leading case upon this rule, and cites many of the earlier cases, giving quotations from their opinions. It holds that the United States Supreme Court will go so far as to change its construction of a statute, when the State Court has changed its construction of the same statute, and when no rights appear to have been acquired under the former decision.

The rule is nowhere better illustrated than in the case of

Flash vs. Conn, 109 U. S., 371.

This case came up from the U. S. Circuit Court for Florida, where it was sought to enforce a stockholders' liability under the statutes of the State of New York. The Supreme Court holds it to have been the duty of the Florida Circuit Court in construing that statute to follow the decisions upon that statute of the Courts of the State of New York. It is true that the case does not take the advanced position afterwards taken in *Huntington vs. Attrill*, but seems to make the right of enforcement in Florida depend upon the question of whether the statute is penal or contractual in nature. To that extent it must be deemed overruled by *Huntington vs. Attrill*. But it still remains one of many authorities upon the general proposition in reference to the construction of State Constitutions and statutes by State Courts and the consequent duty of the Federal Court to follow such construction. It is particularly in point because it relates to a stockholder's liability, and the manner of and the prerequisites to its enforcement.

For the most recent case in the Supreme Court reiterating this rule, see

The California Irrigation cases, 164 U. S., 112.

The decisions of the State courts of the *forum* are not controlling on a question of this nature.

Huntington vs. Attrill, cited *supra*.
Bauserman vs. Blount, 147 U. S., 647.

Indeed, force and effect are given to the rule in the State Courts. For instance, in Massachusetts it had been decided in *Bank of North America vs. Pindge*, 154 Mass., 203, that construing the Kansas Constitution and statute according to the decisions of the State Court of Massachusetts, an action such as that in the case at bar would not lie. Thereupon, a suit was brought in which not

only the statutes of Kansas were pleaded in the declaration, but in which it was also pleaded that as interpreted by the decisions of the Supreme Court of Kansas, the liability of the defendant as a stockholder was a contractua liability, etc.

Hancock Bank vs Ellis, 166 Mass., 414.

The Court says :

> " The liability of the stockholders must be determined according to the law of Kansas. We now have a case where the declaration as we interpret it sets forth that according to the law of Kansas, the defendant is liable to a judgment creditor of the corporation as upon a contract which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this Court (see *Bank of North America vs. Rindge*, 154 Mass., 203), and the alleged liability of the stockholders is of a different character from that which exists in this Commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established. Accordingly, jurisdiction exists here to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. On the demurrer we can only look at the averments of the declaration. We can not take judicial notice of the statutes of Kansas, or of their interpretation by the Courts of that state. At this stage, we simply look at the case as the plaintiff presents it.
>
> " The fact that the corporation is in the hands of receivers is immaterial, because under the averments of the declaration the liability of the defendant is directly to the creditors, and the receivers could not enforce it (*Barre National Bank vs. Hingham Manuf. Co.*, 127 Mass., 563, 567, Cook, " Stock and Stockholders," Sec. 218, and cases there cited). The averments are sufficient to set forth that the defendant is such a stockholder as by the law of Kansas would be liable to the plaintiff. Judgment reversed and demurrer overruled."

Since the decision of the case at bar in the Circuit Court of Appeals the case of *Hancock National Bank vs. Ellis* was heard in the Supreme Court of Massachusetts upon the merits. Its opinion is

not yet reported in the regular reports, but will be found in 51 Northeastern Reporter, page 207. In many respects it is the most important authority which the respondent cites, because it shows that a State Court of the highest rank has completely changed its views upon the question of the liability of a Kansas stockholder.

The concluding paragraph of the opinion should be quoted here :

> " Upon the evidence introduced at the trial," (which was the Kansas decisions), " a majority of the Court think that the reasonable inference is that the action given to enforce the liability of stockholders under paragraph 1192 of the General Statutes of Kansas of 1889, was intended to be a transitory action of such a nature that it might be brought in any Court of general jurisdiction over similar actions in any State or country, where service according to the laws of that State or country could be made upon the stockholder."

So in *Marshall vs. Sherman*, 148 N. Y., 9, Judge O'BRIEN is careful to say that :

> " The complaint contains no allegation as to the meaning or effect of these statutes or of the provision of the constitution quoted, under the adjudication of the Courts of Kansas. We are, therefore, obliged to construe them ourselves with the aid of such rules, and upon such principles as the Courts of this State apply in the construction of such enactments here."

It may yet be that when some pleader is fortunate enough to overcome all the technical objections that arise in the State Court when a suit of this nature is brought, even the Courts of the State of New York will give effect to the Kansas Constitution.

In the Federal Court the technical requirements of pleading and proving the Constitution or statutes and the judicial interpretation thereof by the Courts of other States have been done away with from a very early date. The Court takes judicial notice of them.

Owings vs. Hull, 9 Peters, 607.
Hanley vs. Donohue, 116 U. S., 1, 6.
Mills vs. Green, 159 U. S., 651.

One more case should be cited in this connection, as it is distinctly in point in considering the effect of the Kansas *judgment*.

In *Glenn vs. Liggett*, 135 U. S., 533, it was held in reference to the effect of a judgment in Virginia under certain statutes of Virginia, that the rights of the parties must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made.

That case held, moreover, that the judgment in that case could only be reviewed or impeached collaterally for lack of jurisdiction or for fraud.

(b)

Coming, then, to consider the Kansas statutes and the decisions thereunder, we first call attention to that part of Judge SHIPMAN'S opinion in the Court below which gives their history (89):

> "The germ of the present statutes of Kansas is found in the territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed and statutory provisions in regard to the individual liability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form until the revision and codification of 1868.
>
> "The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of section 14, chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: 'The stockholders of any company organized under this act shall, to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company.' The Supreme Court of Kansas, in *Grund vs. Tucker*, 5 Kan., 70, held that 'under this statute a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863 to recover a debt due by the corporation.' The court thus anticipated the decision in *Flash vs. Conn*, regarded 'each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock,' re-

jected the idea of a proportionate liability or a *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity."

The statement of the liability was then placed in the Constitution, and in consequence was not expressly reiterated in the codification of the statutes which took place in 1868.

The question at bar was first decided in the leading case of *Howell vs. Manglesdorf*, 33 Kan., 194 :

In this case the Court is construing Section 32 of the statute, and remarks as follows :

> " It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case, the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the Court where the judgment was rendered against the corporation ; in the other, by an ordinary action to be instituted wherever personal jurisdiction of the stockholders can be acquired."

It then shows why the summary proceeding by motion is only available where the notice is served within the State of Kansas, and concludes that :

> " This ruling does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here. While the liability is statutory, *it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder.*"

This case is the subject of continuous criticism on the part of our opponents. In fact all the troubles of Kansas stockholders are supposed to be derived from its decision.

The Massachusetts Court in the *Hancock National Bank* case answered most effectively the contention that the statements in the

opinion in this Kansas case are not binding because they are *dicta*. That Court says:

> "The Courts of Kansas from the nature of the question, can never directly decide that the liability of a non-resident stockholder under paragraph 1192 of the General Statutes of Kansas is one that may be enforced in any Court of general jurisdiction in any other State or country where personal service can be made upon the stockholder. Only courts of other jurisdictions can decide that question. The Courts of Kansas can only express an opinion to that effect, if they entertain it in cases before them, as one of the reasons for the judgment they render in those cases. That opinion the Supreme Court of Kansas has expressed in *Howell vs. Manglesdorf*. The other decisions cited of the Courts of last resort in Kansas tend to confirm that opinion. None is inconsistent with it."

Judge SHIPMAN's observations on this point are also pertinent:

> "It is true that this language is *obiter* in the sense that it was not absolutely necessary to the decision of the question before the Court, which was, whether by notice to a non-resident, the Kansas Court could order execution to issue against him; but it clearly stated the theory of the Court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not *obiter*, because it answered the argument that the liability of non-resident stockholders must be enforced by notice and the levy of an execution or was not enforceable, and that, therefore, in many instances the creditors were without remedy."

We call attention to the fact that the general nature of the stockholder's liability was considered in *Howell vs. Manglesdorf*, and the Court expressly holds that "the liability to the creditors of the corporation is in the nature of a guaranty."

See, also, *Hentig vs. James*, 22 Kan., 326.

In *Abbey vs. The Dry Goods Co.*, 44 Kansas, 415. the direct point decided was that in enforcing the stockholders' liability, action *must* be against each particular stockholder, and

that it was improper to join various stockholders. The case shows that the statute was merely an endeavor to formulate the ordinary rules of law relating to this class of actions.

See, also, Kansas general statutes, 1889, Section 4087, abolishing distinctions between suits at law and in equity, and Sections 1098 and 1101 prescribing that all joint liabilities shall be considered several as well.

(c)

The current of authority in the Federal Circuit Court and Circuit Court of Appeals in support of enforcing the liability in Courts outside of the territorial limits of Kansas is overwhelming. The first important case was that of

Rhodes vs. The United States National Bank, 66 Fed. Rep., 512, decided in 1895, by the Circuit Court of Appeals for the Seventh Circuit. That was an action of the precise nature of the one at bar; namely, a suit in Illinois by a creditor of a Kansas corporation to charge a stockholder thereof with the individual liability. The Court (p. 516) cites the Constitution and statutes and follows them by citations at length from the decisions of the Supreme Court of the State of Kansas. It holds that the United States Circuit Court for the Northern District of Illinois has jurisdiction over the subject of the action, and affirms the judgment below, holding the defendant liable as a stockholder.

Soon after the decision of the above case, the case of *Mc Vikar vs. Jones*, 70 Fed. Rep., 754, was decided by Judge ALDRICH in the United States Circuit Court for the District of New Hampshire. This was a case of precisely the same nature as the one at bar. Judge ALDRICH held that an action would lie to enforce the liability in the Circuit Court for the District of New Hampshire. We refer the Court to Judge ALDRICH'S opinion for its admirable and lengthy citation of cases.

So, also, *Bank of North America vs. Rindge*, 57 Fed. Rep., 279, which was a case to enforce the same liability. It was held by Judge Ross in the Circuit Court for the District of California that the action would lie in that Circuit Court.

To the same effect is the decision in *Dexter vs. Edmands*, 89 Fed. Rep., 467. This was rendered by Judge LOWELL in Massachusetts, and contains a long and independent examination of the theories and authorities upon the subject. The learned Court

goes into it most exhaustively, particularly so because at the time he wrote the opinion the State Court of Massachusetts had not handed down its last decision in *Hancock Bank vs. Ellis.*

In addition, there are the decisions of the Circuit Court and of the Circuit Court of Appeals in the case at bar, both Judge SHIPMAN and Judge WHEELER writing exhaustive opinions.

Besides the above cases there are also

Brown vs. Trail, 89 Fed. Rep., 641 (Circuit Court of Maryland).

The Mechanics' Savings Bank vs. Fidelity Co., 87 Fed. Rep., 113 (Circuit Court of Pennsylvania).

Shiffer vs. Trustees of Columbia College, 87 Fed. Rep., 166 (Circuit Court of New York).

American Freehold Co. vs. Woodworth, 82 Fed. Rep., 269 (Circuit Court of New York).

There is not one Federal authority to the contrary.

The authorities in the State courts we shall consider in the succeeding point.

V.

The authorities in the State courts are mostly in support of the respondent's position.

First of all, in this connection, we call attention again to the full and admirable opinion in the last decision of the Supreme Court of Massachusetts in *Hancock National Bank vs. Ellis.* It is too long to be quoted. This decision is particularly gratifying because the Court has been substantially converted from its first views, which were antagonistic to our contentions.

It has been held in the Supreme Court of the State of Missouri that the action would lie in the State Court of Missouri (*Guerney vs. Moore*, 131 Mo., 650). The following observations of Judge GANTT are pertinent :

> "It does not follow that because the people of this Commonwealth have restricted the liability of stockholders in corporations created by virtue of our own laws to the

amount of their stock that they will refuse to enforce in their Courts the contracts of its own citizens who voluntarily go into other States and become stockholders in corporations under their laws, which impose upon stockholders a present liability in excess of the amount of the stock taken. Such a contract is not against public policy; it contravenes no principle of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of honesty or justice (pp. 673-674)."

So, also, in the Supreme Court of the State of California, it has been held that the action lies in the California state court.

Ferguson vs. Sherman, 116 Cal., 169.

The Court takes a very broad view of the liability, and holds that a stockholder in a street-railway corporation is *not* within the constitutional exception relating to "railway corporations."

Only recently the highest court of the State of Michigan has adopted the same conclusion. The case is not yet reported in the regular Michigan reports.

Western National Bank of New York vs. Lawrence, 76 N. W. Rep., 105.

All of the authorities were reviewed in the opinion of the Court. Held that the general trend of the decisions, both in the State and Federal Courts, was in favor of enforcing the liability.

The liability has also been upheld in

Tuttle vs. The National Bank of the Republic, 48 Ill. Appellate Court, 481.
Bank vs. Zinser, 55 Ill. Appellate Court, 510.
Marshall vs. Sherman, 84 Hun, 186.

Counsel for the petitioner are, therefore, remitted for their authority to the highest Courts of the States of New York, Illinois and Rhode Island.

Referring first to the decision in the State Court of New York—*Marshall vs. Sherman*, 148 N. Y., 9:

The Court in this case reversed the decision of the General Term which was accompanied by an able opinion from Judge HERRICK. The case is not really in point (as stated by Judge SHIPMAN), because it refuses to take notice of the Kansas decisions. Its doctrines, moreover, are substantially in conflict with the doctrine of *Hunting-*

ton vs. Attrill. Indeed, its doctrines in many respects are contrary to the former decisions of the same Court, such as *Cochran vs. Wiechers*, 119 N. Y., 339, holding that a liability of this nature is contractual, and contrary to the subsequent decisions by the same Court, such as *Close vs. Potter*, 155 N. Y., 145. It is contrary to such a case as *Weeks vs. Love*, 50 N. Y., 568, and all the New York cases cited in *Flash vs. Conn*, on the point that the remedy is at law and that suit will lie against a single stockholder. All this is substantially admitted in the opinion of the learned Judge, who says :

> " It would perhaps be impossible to state the principle upon which the decision should rest without apparently coming in conflict with some of the numerous cases on the subject at some point " (p. 28).

In the case of *Stoddard vs. Lum*, 32 App. Div., 565, there is an extremely able dissenting opinion protesting against the decision of *Marshall vs. Sherman*, and showing how contrary to the general trend of authorities, even in the State of New York, that decision is.

So far as *Lowry vs. Inman*, 46 N. Y., 119, and *Christensen vs. Eno*, 106 N. Y., 97, are concerned, it is easy to distinguish the nature of the statutes involved in those cases. Both of them lack the fundamental declaration of the right which is contained in the Kansas Constitution. In *Savings Society of St. Louis vs. O'Brien*, a case decided in 1889 by the General Term of the Supreme Court, and reported in 3 N. Y. Supp., 764, statutes of this nature are sufficiently distinguished. The law, as stated in this latter case, would be applicable to the instance of the Kansas Constitution. And it was good law in the State Courts of New York until the decision of *Marshall vs. Sherman*. But the doctrine of all these cases is *contra* to *Huntington vs. Attrill*.

Another State Court on which counsel for the petitioner relies is that of Illinois. In the first case in any of the Courts of that State, the " Appellate Court," which is the Appellate Court of first resort, supported the right of a creditor to proceed outside the State of Kansas, (*Tuttle vs. National Bank of the Republic*, 48 Illinois Appellate Court Rep., 451). Shortly after that was decided, the Supreme Court of the State, in *Fowler vs. Lamson*, 146 Ill. 472, held that the Constitution of Kansas was self-executing, but that the two special remedies provided by the statute prevented the Constitution from executing itself

outside the limits of the State of Kansas. The character of this decision was such as to cause the Appellate Court to pass it by in *Bank vs. Zinser*, 55 Ill., Appellate Court Rep., 510. Meanwhile the *Tuttle* case had gone to the Supreme Court, and a decision was first handed down which appeared in the "National Corporation Reporter" of Chicago, 20 December, 1894 (Vol. 9, p. 316), distinguishing *Fowler vs. Lamson* on the ground that in that case the original judgment had been recovered in another State than Kansas, and affirming the decision of the Appellate Court (It is referred to in the opinion in *Bank vs. Zinser*). This decision was in some way rescinded, and eventually the Court, by a vote of four to three, held that the Constitution was *not* selfexecuting, and that therefore the liability would not be enforced (161 Ill., 497). The able dissenting opinion in that case has a valuable citation of cases. It is therefore apparent that most of the Judges in the State of Illinois before whom this question has come are of the opinion that the action will lie, and that the four Judges who have brought about the rule finally laid down in the *Tuttle* case have first changed their minds as to whether the action would lie, and then have changed their minds back again, the second time, however, giving different reasons than before their first change.

The State Court of Rhode Island in *Hancock Nat. Bank vs. Farnum* has also taken a position in opposition to the general line of authority. Its decision is based upon the theory that there was no real meeting of the mind of the stockholder with the mind of the corporation or of the creditor upon the point of this liability. Therefore the case holds that the liability is not truly contractual. There are two answers to this—first, there is practically as much of a meeting of minds in this instance as in any instance of a stockholder's liability, and if the reasoning of the Court of Rhode Island were adopted it would result in calling all stockholders' liabilities penal instead of contractual. But in the second place, the minds distinctly do meet. A stockholder in a corporation is presumed to know and understand the effects of the organic law of that corporation. That law is read into the contract of subscription for or purchase of the stock. When his mind meets with some one else's mind upon the point that he is to be a stockholder in the corporation, he is conclusively presumed to intend the consequences of his own act. One of those consequences, in the case of a stockholder in a Kansas corporation, is this individual liability.

Were there no corporation, he would be liable as a partner; that

is, as one of the principals. There being a corporation, his liability is limited by the common law to the obligation to pay for the amount of stock held by him; but by the Constitution of Kansas this is again increased by an additional liability to an amount equal to the stock held by him. These liabilities he takes upon himself by the contract of becoming a stockholder under which he contracts to share in the corporate assets and in the corporate profits, without subjecting himself to more than a limited liability for its losses. The common law is read into his agreement to become a stockholder, but no more and no less than is the Kansas Constitution read into his agreement to become a stockholder in a Kansas corporation.

In *Ferguson vs. Sherman* (cited *supra)* the Court discusses this particular point at length, and makes its decision depend upon it.

We, therefore, submit that the weight of authorities in the State Courts is in line with the authorities in the Federal Courts.

VI.

The Statute of Frauds has nothing to do with the case.

This point of our opponents is raised for the first time in this Court. There are several simple and conclusive answers: First, no assignment of error brings it before this Court. Second, the defense of the Statute of Frauds must always be pleaded in New York Federal or State Courts *(Crane vs. Powell*, 139 N. Y., 39*)*. Third, the liability arises out of the original contract relation of the stockholder, and not out of any independent contract with the creditor to guarantee the payments of the debts of the corporation.

VII.

Recovery has been sanctioned also by Section 44 of the Kansas statute.

Our learned opponents would not have made the technical point relative to the pleading were they in the courts below. It is well settled by New York practice that where a defendant has answered any judgment may be given which is warranted by the allegations of the complaint irrespective of the relief demanded in the complaint (Code Civ. Pro., Section 1207; *Underhill vs. R. R. Co.*, 21 Civ. Pro. Rep., 441, and cases there cited). It is also well settled that where a complaint states ambiguously two causes of action the defendant's proper course is to make the complaint more definite and certain, otherwise the point is waived *(Commercial Bank vs. Pfeiffer*, 108 N. Y., 242*)*.

This particular section of the Kansas statute seems to us to cover the case where it would be "nugatory or impossible" to require the entry of a judgment and the issuance and return of an execution (see the observations of Judge WOOD in *Flash vs. Conn* at p. 380). The statute therefore dispenses with this requirement, and provides that, when a corporation has suspended business for more than a year, action may be brought against the stockholders on the original debt and without joinder of the corporation. The only special *remedy* in this latter statute does not relate to the action against the stockholder, but relates to the action which the stockholder who has satisfied his liability may have on that account for contribution against his brother stockholders. He "may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable," and if he obtains judgment he may have a peculiar and flexible execution. Obviously there is nothing in the statute which would limit his right to sue for contribution elsewhere than in Kansas, the statute merely intending to enact that if he does sue for contribution in Kansas he may have this peculiar remedy by execution. What proceedings, however, he may take for contribution certainly can have no effect in limiting the right to proceed against him for the original recovery. The very fact that contribution is contemplated shows that the Legislature had in mind an absolute liability on his part to the creditor. The burden is put upon the stockholder to

seek contribution, and not upon the creditor by only permitting him to obtain from one stockholder his proportionate share. In the case at bar it will be noticed that we are within the conditions precedent stated in this statute for a suit against a stockholder. The corporation has suspended business for more than a year prior to the institution of this action, and we have proved the original obligations which were debts unpaid at the time of its suspension.

The petitioner has precisely the same right to sue his co-stockholders for contribution that he would have had if he had been sued in Kansas instead of in New York. He loses no rights and suffers no harm by being sued in one jurisdiction rather than another.

VIII.

The Point of Expediency is Not Against the Respondent.

In response to the observations in the brief for the petitioner under this heading, it is proper to call attention to the fact that the petitioner in this case owned one-half the stock in the bank and was one of its directors. Under those circumstances it was most obviously his duty to " meddle in the affairs of his company, or keep himself informed as to what was going on." We fail to see any hardship in imposing that responsibility upon him. The liability does not apply to stockholders in railway corporations, which is the instance of a large corporation with scattered shareholders, and where there might well be some hardship in case of insolvency if they were personally made liable.

The second point of expediency advanced seems to be against the petitioner. Is it not more expedient that the few State Courts whose decisions are in favor of the petitioner should rather conform their views to the other State Courts whose decisions are in favor of the respondent, than that the entire Federal Judiciary should overturn its former decisions? This matter came first before the Federal Courts. The decisions of the three State Courts of Illinois, New York and Rhode Island are in distinct opposition to *prior* authorities.

IX.

The Assignments of Error.

The first three assignments of error relate to the competency of the proof relative to the change of name of the corporation. Judge SHIPMAN disposes of this point at the conclusion of his opinion (95). The petitioner's counsel have not discussed this question in their brief in this court.

The fourth, fifth and sixth assignments of error bring up the materiality of the proof of the original indebtedness. Either this proof was material, or else it was surplusage. In either event the petitioner could not object to its introduction.

The seventh assignment of error related to the proof by which we showed that the assignee of the corporation had nothing in his hands. It is true that this was surplusage.

> Thompson on Liability of Stockholders, Section 320, and cases there cited.
> *Hancock National Bank vs. Ellis*, 166 Mass., 414,

But if surplusage, assuredly the petitioner was not harmed by it.

The other assignments of error bring up the questions heretofore discussed. One of them possibly involves the regularity of the Kansas judgment. The point as to this is not urged on the brief of counsel in this court. It was disposed of by Judge SHIPMAN in the Circuit Court of Appeals (95).

X.

The analogy to the case of stockholders in the national banks.

We distinctly take issue with our learned opponents in their attempts to distinguish the Kansas Constitution and statutes from the provisions of the National Banking Act and the provisions of the act of the State of New York. The wording of the Kansas Constitution is almost precisely the same as the declaration in the Na-

tional Banking Act, that stockholders "shall be held individually responsible for all contracts," etc., "to the extent," etc. Almost the same words are used in the New York act, namely, "individually liable for all debts and contracts," etc.

The cases of *Richmond vs. Irons*, 121 U. S., 27, and *Wiles vs. Suydam*, 64 N. Y., 173, and the various other New York cases cited in *Flash vs. Conn*, are, in our opinion, direct authorities in our favor upon this point. See also Morawetz, Sections 872-877.

It is true that intending stockholders in national banks usually are actually mindful of the individual liability. This arises from the fact that the statutes of Congress are better known. But it goes without saying that the mere failure to have in mind the possible consequence of becoming a stockholder in a Kansas corporation should not produce any different legal result, even if it evokes sympathy. Indeed, it is decidedly questionable whether—in view of the well known fact that statutory liability of stockholders exists in some form in most if not all of the States—any reasonably intelligent person can become a stockholder in any corporation without inquiring whether he will become liable for the debts of the corporation, and if so, under what circumstances. Failure to make such inquiry is the grossest kind of negligence. Certainly, where the people of a State have explicitly provided for such liability by a Constitutional provision, they have served notice upon all mankind in as public a manner as human ingenuity can devise. No intelligent man buying or subscribing for stock in a Kansas corporation can with any propriety plead ignorance of the Kansas Constitution.

XI.

The decision of the Circuit Court of Appeals should be affirmed.

WILLIAM B. HORNBLOWER,
HOWARD A. TAYLOR,
Of Counsel.

No. 182. 27.

FEB 24 1899

Supreme Court of the United States.

Sup. Ct. of Hornblower & Taylor for Resp't.

GEORGE L. WHITMAN,
Petitioner,

AGAINST

THE NATIONAL BANK OF OXFORD,
Respondent.

October Term, 1898.
No. 182.

Filed Feb. 24, 1899.

Supplemental Brief for Respondent.

Since the filing of the original brief in behalf of the respondent the decision of *Bell vs. Farwell* has been reported. This was a case decided December 21st last by the Supreme Court of the State of Illinois. It will be found in 52 N. E. Rep., page 346. The Supreme Court of the State of Illinois was the first court to take a position adverse to the views of the respondent. The trend of its decisions is discussed at pages 31 and 32 of our brief.

This Court has now squarely held upon demurrer that the liability is enforceable outside of the territorial limits of Kansas. The decision is precisely in line with the decision in *Hancock Bank vs. Ellis* when that first came before the Supreme Court of Massachusetts on demurrer. Doubtless the case of *Bell vs. Farwell* will reach the same final result. The Court, moreover, expresses its opinion that the liability can even be enforced in Illinois in case of insolvency of a corporation, without a precedent judgment against the corporation, under the alternative section of the statute. Its views are particularly instructive in this respect.

The following extracts from the opinion are of interest :

> " The statute in question is neither a criminal nor a penal law. There is no ground for holding that the liability imposed by the constitution and statute of Kansas is penal in its nature or purpose.
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> * * * * * * *
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> " Nor does the act in question undertake to provide any form of action whatever. It merely provides that suits may

be brought against any persons who are stockholders, without undertaking to determine the character or kind of action that shall be brought. It is true, the liability of the stockholder to the creditors is one imposed by statute; but at the same time the liability is one arising out of contract. Where the charter of the corporation provides that the stockholder shall be liable to creditors individually, as was the case here, all persons who became stockholders agreed to become liable to all who might give credit to the corporation. The stockholders offer to the public to be liable as a corporation to the extent of the capital invested in the corporation, and they agree to become liable individually to an amount specified in the act of incorporation. Persons who give credit to the corporation do so upon the faith of the personal liability of the stockholders, and upon what principle can it be said that the liability is not contractual? In the discussion of this question Morawetz on Private Corporations (Section 870) says: 'If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in their corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable, in their corporate capacity, to the extent of the capital which they have agreed to contribute for the purpose of carrying on the Company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation, contract upon the faith of this liability held out as their security and the offer of the shareholders, being thereby accepted, ripens into a binding contract.'"

WILLIAM B. HORNBLOWER,
HOWARD A. TAYLOR,
Of Counsel.